

Crimmigration Realities & Possibilities

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Over the last dozen years, crimmigration has blossomed into a vibrant intellectual field plowed by numerous disciplinary perspectives worldwide. Guided by Juliet Stumpf's groundbreaking articulation of the merger between governmental norms regulating criminal and immigration processes,¹ scholars have examined national, international, and regional developments in lawmaking and law enforcement.² As the literature elucidates, crimmigration laws and policies now appear in a diverse range of countries and regions. In Latin America, Mexico has boosted its security presence along its southern border to ensnare illegalized migrants. Colombia has responded to political turmoil in Venezuela by suspending traditional permission to cross the border and deploying 2,000 soldiers.³ In the United States, eight years of record-high immigration imprisonment and deportation under President Barack Obama turned the convergence of criminal law and immigration law into the new normal.⁴ Donald Trump's rise to the presidency marks crimmigration law's reach into the center of federal criminal and immigration law apparatuses and pushes its most xenophobic rhetorical flairs to the top of the discursive stage. In Europe, the United Kingdom maintains a sizable detention estate rife with abuses,⁵ French authorities regularly unleash blunt force against refugee camps in the northern coastal city of Calais,⁶ and Italian vigilantes have even killed migrants.⁷ On the European Union's

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¹ See generally Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

² See, e.g., SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR (Maria João Guia et al. eds., 2013) (offering an interdisciplinary, multinational engagement with crimmigration); RACE, CRIMINAL JUSTICE, AND MIGRATION CONTROL: ENFORCING THE BOUNDARIES OF BELONGING (Mary Bosworth et al. eds., 2018) (same).

³ Anggy Polanco & Anthony Boadle, *Colombia, Brazil Tighten Borders as Venezuelan Crisis Deepens*, REUTERS (Feb. 8, 2018, 1:30 PM), <https://www.reuters.com/article/us-venezuela-colombia/colombia-brazil-tighten-borders-as-venezuelan-crisis-deepens-idUSKBN1FS2VW>.

⁴ See César Cuauhtémoc García Hernández, *Removals & Returns, 1892–2015*, CRIMMIGRATION (Feb. 16, 2017), <http://crimmigration.com/2017/02/16/removals-returns-1892-2015/> (providing statistical comparisons across seven of eight years under President Obama and approximately a century before then).

⁵ *United Kingdom Immigration Detention Profile*, GLOBAL DETENTION PROJECT (Oct. 2016), <https://www.globaldetentionproject.org/countries/europe/united-kingdom> (explaining that the UK holds approximately 30,000 people daily in the nine facilities that are part of its immigration detention estate, making this “one of the largest immigration detention systems in Europe . . .”).

⁶ See generally KATE EVANS, *THREADS FROM THE REFUGEE CRISIS* (2017).

⁷ See Crispian Balmer, *Italian Man Held After Driving Through City Shooting at Black*

periphery, politicians deploy fiery nativist rhetoric to rally nativists and erect fences to repel migrants.⁸ In Africa, post-revolutionary Tunisia retains a regressive security-focused migration legal structure.⁹ Meanwhile, Moroccan authorities continue raiding migrant camps five years after the country embarked on a series of human-rights based regularization campaigns.¹⁰ In its own way, each example illustrates crimmigration law's central intellectual contribution—that the border between criminal justice and immigration regulation has blurred beyond meaningful distinction.

The articles appearing in this issue of the *Ohio State Journal of Criminal Law* reveal the ideological and political motivations that propel crimmigration law. Carrie Rosenbaum's *Crimmigration—Structural Tools of Settler Colonialism* does so right from the start. By explicitly invoking the settler colonial paradigm in the article's title and developing it later next to the late luminary Derrick Bell's theory of racial realism,¹¹ Rosenbaum highlights the racial injustice of crimmigration practices on her way to crafting a piercing racial justice critique. While Rosenbaum focuses on crimmigration's current articulation in the United States, in *Crimmigration in Gangland: Race, Crime, and Removal During the Prohibition Era*, Geoffrey Heeren uses previously overlooked archival materials from 1920s Chicago to make crimmigration law's origin story more nuanced. Not only does crimmigration law have roots in an earlier period than other scholars have identified,¹² but the persistence of race policing positions crimmigration alongside other sordid examples of indefensible law enforcement. In that linkage, perhaps a redemptive possibility arises. Linus Chan explore that option more explicitly in *Unjust Deserts: How the Modern Immigration System Lacks Moral Credibility*. Pushing an ambitious vision grounded in a thorough assessment of the Department of Homeland Security's immigration detention and removal system, he retakes the

People, REUTERS (Feb. 3, 2018), <https://www.reuters.com/article/us-italy-shooting-macerata/italian-man-held-after-driving-through-city-shooting-at-black-people-idUSKBN1FN09W>; *African Migrants Injured in Italian Drive-By Attack Days After Nigerian Accused of Murder*, ABC (AUSTRALIAN BROADCASTING CORP.) NEWS (Feb. 4, 2018, 8:24 PM), <http://www.abc.net.au/news/2018-02-04/italy-shooting-several-migrants-hit/9393764>.

⁸ See, e.g., AITANA GUIA, THE CONCEPT OF NATIVISM AND ANTI-IMMIGRANT SENTIMENTS IN EUROPE 7 (2016) (describing nativism in Melilla, the Spanish enclave along coastal Morocco); *Border Fences and Internal Border Controls in Europe*, United Nations High Commissioner for Refugees (May 2017), <https://data2.unhcr.org/fr/documents/download/55249> (mapping fences along the border between exterior EU members states and non-member states).

⁹ Katharina Natter, *Rethinking Immigration Policy Theory Beyond 'Western Liberal Democracies'*, 6 COMP. MIGRATION STUDIES 1, 11 (2018).

¹⁰ *Id.* at 10.

¹¹ See generally Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992).

¹² See Rachel E. Rosenbloom, *Policing Sex, Policing Immigrants: What Crimmigration's Past Can Tell Us About Its Present and Its Future*, 104 CAL. L. REV. 149, 156–64 (2016) (locating crimmigration's beginnings in the 1950s); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1458 (identifying formative crimmigration legislation in the 1980s).

moral clarity of crimmigration discussions. Instead of the myth of migrant criminality that pervades contemporary discourse and that has wide purchase with Democrats and Republicans,¹³ Chan focus his morality gauge on the immigration law enforcement apparatus itself.

In doing so, Rosenbaum, Heeren, and Chan disclose law's "subconscious," to borrow Benjamin Cardozo's famous characterization of law's underbelly.¹⁴ Spanning the United States, these contributions collectively highlight race's ugly role in pushing migration and criminal policies toward a harder line. In the United States and many other countries, it is no longer enough to remove migrants from the national territory. It is now necessary to detain, demean, and disparage along the way. In Jayesh Rathod's *Criminalization and the Politics of Migration in Brazil*, Latin America's most populated country offers an exhilarating counterexample. What if crime and migration laws remain focused on crime and migration, respectively, instead of crossing doctrinal and law-enforcement boundaries? Told from the perspective of recent Brazilian law reforms, Rathod shows that it is eminently possible to maintain distance between criminal and immigration laws and policies. Viewed from the perspective of countries, such as the United States, that have fallen deep for crimmigration law's allure, Brazil, with its own history of troubled race relations, offers a hopeful possibility.

Parting from most crimmigration literature, there is a powerful spirit of hope enmeshed in these articles. The racial justice analysis that pervades each article—whether explicitly or implicitly—injects the rich tradition of anti-subordination inquiry foundational to critical race theory into the crimmigration literature.¹⁵ Most promisingly, critical race theory's latent critique of capitalism's entanglement with race merits a hard look in the context of crimmigration law and law enforcement practices.¹⁶ For the private prison corporations and local governments that receive millions of dollars from the Immigration and Customs Enforcement agency, there is an obvious financial motive to detaining hundreds of thousands of people annually.¹⁷ More subtly, there is also a material reward to be

¹³ See César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CAL. L. REV. 1449, 1490–98 (2015).

¹⁴ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 11 (1921).

¹⁵ See Marc-Tizoc González, *Cluster Introduction: Education and Pedagogy: Counter-Disciplinarity in the Critical Education Tradition in LatCrit Theory*, 8 SEATTLE J. SOC. JUSTICE 107, 112 (2009) (describing antsubordination as "foundational" to Latina/o critical theory).

¹⁶ See Gloria Ladson-Billings & William F. Tate, IV, *Toward a Critical Race Theory of Education*, 97 TEACHERS COLLEGE RECORD 47, 53–55 (1995) (tying class privileges in the United States to racial subordination); see also Robert Young, *Putting Materialism Back Into Race Theory: Toward a Transformative Theory of Race*, in RACE AND THE FOUNDATIONS OF KNOWLEDGE: CULTURAL AMNESIA IN THE ACADEMY 32, 32 (Joseph Young & Jana Evans Braziel eds., 2006) (arguing that capitalism produces various measures of difference, including race, "and accompanying ideological narratives that justify the resulting social inequality" and "articulates a transformative theory of race . . . that reclaims revolutionary class politics in the interests of contributing to a post-racist society.").

¹⁷ See García Hernández, *supra* note 13, at 1507–11.

had in the rabid rhetoric that has become the norm under President Trump but that stretches back—admittedly, in substantially milder form—to President Obama’s “felons, not families” comment.¹⁸ Vilification is designed to create villains and vilifying rhetoric differentiates the good from the bad. It paints a simplified picture of a world that can be divided into the deserving and undeserving. Neatly positioned into boxes, we can point to the undeserving as the threats on the horizon. Whoever defines “we” is always sure to be deserving of wealth, privilege, comfort, and a life without fear that the police will come knocking on their door. Fear matters. People make decisions based on fear. They keep quiet about organizing the workplace or reporting crime.¹⁹ They get ill based on fear.²⁰ School performance suffers.²¹ Political rhetoric and law-enforcement tactics that drive fear into migrants have as a consequence their juridical marginalization. In exploitability, there is profit for employers, prison profiteers, and local governments.

Even if Congress could agree on what markers rightfully position someone in the box of desirable or undesirable migrants, neither it nor anyone else could waive a magic wand clearing the dust of human complexity to illuminate the true character of each of us. We are instead, as critical race theorists have long asserted, a mess of internally diverse creatures. These articles do not hide migrants’ complexity. Like all humans, the people who move from one country to another are imperfect, self-contradictory creatures of habit and circumstance. Regrettably, right-wing rhetoric ignores nuance in favor of a simplified narrative of

¹⁸ Barack Obama, President of the United States, *Remarks by the President in Address to the Nation on Immigration* (Nov. 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

¹⁹ See NIK THEODORE, *INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT* 5 fig.1 (2013) (finding a substantial increase in the number of unauthorized migrants reporting “they are less likely to contact law enforcement authorities if they were victims of a crime.”); Ruth Gomberg-Munoz & Laura Nussbaum-Barberena, *Is Immigration Policy Labor Policy?: Immigration Enforcement, Undocumented Workers, and the State*, 70 HUM. ORG. 366, 373 (2011) (finding that immigration policies “produce an extra vulnerable immigrant labor force in the United States . . .”).

²⁰ See, e.g., Stacey A. Tovino, *The Grapes of Wrath: On the Health of Immigration Detainees*, 57 B.C. L. REV. 167, 174 (2016) (“Immigration detention centers routinely fail to provide physical and mental health examinations of detainees . . .”); Nicole L. Novak et al., *Change in Birth Outcomes Among Infants Born to Latina Mothers After a Major Immigration Raid*, 0 INTL. J. EPIDEMIOLOGY 1, 5 (2017) (finding that rates of low birth weight increased among children born to Latina mothers after a major immigration raid); Allen S. Keller et al., *Mental Health of Detained Asylum Seekers*, 362 THE LANCET 1721, 1722 (2003) (finding that immigration detention exacerbates psychological trauma).

²¹ See, e.g., HEATHER KOBALL ET AL., *HEALTH AND SOCIAL SERVICES NEEDS OF US-CITIZEN CHILDREN WITH DETAINED OR DEPORTED IMMIGRANT PARENTS* 11 (2015) (reporting “children’s performance and behavior following parental deportation were generally negative.”); David K. Androff et al., *U.S. Immigration Policy and Immigrant Children’s Well-Being: The Impact of Policy Shifts*, 38 J. SOC. & SOC. WORK 77, 87 (2011) (noting that after an Iowa immigration raid, “half of the school system’s students were absent . . . including 90 percent of Hispanic children.”).

migrant dangerousness. On the left, liberalism adopts a similar tenor. Take the Dreamers—those migrants brought to the United States as youth—who are sympathetic because they are supposedly unblemished by the contradictions of adulthood. Were they allowed any agency on the question of their location on the face of the earth, they would lose their privileged position in the liberal storyline about migration. Take the workers who are “not criminals,” as if criminality was an unusual concept in the United States. Take the “criminal aliens” whose essence has been boiled down to the stain of criminality, a mark that can be defended only if we forget that criminality does not attach to the act of criminality, thus countless privileged people go about their crimes without suffering the label’s heavy toll—perhaps because they sexually assault in college dormitories or private offices, perhaps because their white-collar crimes are easily forgiven and difficult to prove. We seem to like our victims pure. Any blemish is one blemish too many to be a victim. Instead, the blemished individual is cast into the realm of the undeserving threat. And so, the Dreamer who runs afoul of the police becomes not a Dreamer; the transition to criminal alien happens as quickly as it does permanently. The box of undesirability has rigid boundaries traversable only in one direction: inward.

The demonization of migrants that has become commonplace in recent decades does not arise from a vacuum. Instead, it builds on a history of identifying outsiders and marking them as dangerous. In her towering *Origins of Totalitarianism*, Hannah Arendt wrote of the stateless as the “scum of the earth” for whom even criminality represented a step in the direction of becoming humanized. Affirming this characterization in light of the contemporary European experience with refugees, Jamil Khader says that refugees “stand outside [the global capitalist system’s] notion of the good, a part of no part.”²² They are, in this way, constitutive of civilization itself, but as its negative. In representing the worst specimens, the barely humans or formerly humans or never humans, they adorn the rest of us with civilization’s halo.

In the United States, Europe, and Latin America (indeed, it is hard to find an exception), racialization frequently rears its head as the marker of this inerasable stigma. Racialized insiders cast racialized outsiders as the threat from which the elite must protect the vulnerable. Germany’s interior minister says “Islam does not belong in Germany.”²³ In Austria, Chancellor Sebastian Kurz casts Muslim refugees as the embodiment of danger.²⁴ In the United States, Donald Trump does

²² Jamil Khader, *Beyond the Biopolitics of the Refugee: Totality, Global Capitalism, and the Common Struggle*, in *THE FINAL COUNTDOWN: EUROPE, REFUGEES AND THE LEFT* 143, 165 (Jela Krečič ed., 2017).

²³ See Justin Huggler, *German Interior Minister Declares ‘Islam Does Not Belong’ in the Country*, *THE TELEGRAPH NEWS* (UK) (March 16, 2018, 4:31 PM), <https://www.telegraph.co.uk/news/2018/03/16/german-interior-minister-declares-islam-does-not-belong-country/>.

²⁴ See Emir Numanovic, *Austria’s Leading Election Candidates Target Muslims to Score Points*, *DEUTSCHE WELLE* (Dec. 12, 2017), <http://www.dw.com/en/austrias-leading-election-candidates-target-muslims-to-score-points/a-40931812> (describing Kurz as focused on “protect[ing]

too, but leaves room for Mexican rapists.²⁵ His immigration policing chief Thomas Homan adds politicians opposed to the administration's immigration policing priorities to the list saying they ought to be prosecuted and, presumably, imprisoned.²⁶ The gap between despised migrant and opposition legislator has closed. "You're either with us or against us," President George W. Bush famously said in the heated days following the September 11, 2001 attacks in the United States.²⁷ Terrorism's securitization logic, we now see, has no limits.

To reach this new plane of hysteria, the fear of migrants that drives security-focused policy responses has depended on support across the political spectrum and into the reaches of the ordinary classes. Gramsci's organic intellectual is frequently aligned with leftist politics, but it must not be so. In his *Prison Notebooks*, he described organic intellectuals merely as "the thinking and organizing element of a particular fundamental social class."²⁸ Their role is to "organiz[e] the social hegemony of a group."²⁹ Ideological organizing happens everywhere, always. Today, many of the people "directing the ideas and aspirations of the class to which they organically belong," as two Gramsci scholars described his model, do so through a crimmigration lens.³⁰ "But most of your migrants are not Muslims," a Slovenian acquaintance told me in a disheartening attempt to distinguish the United States government's approach from his own government's. "Migrants are welcomed, but we expect them to learn our ways," a well-informed Slovenian said to me a few days later. This tiny country of two million sandwiched between Italy, Austria, Hungary, and Croatia knows migration without migrants. Only 16,623 newcomers arrived in 2016.³¹ Having so few migrants does not keep the fear of migration from lingering. And so, the prime minister faced an impeachment threat for supporting a Syrian asylum seeker's

the country's borders, fight[ing] political Islam and limit[ing] immigration.").

²⁵ See Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), <http://time.com/4473972/donald-trump-mexico-meeting-insult/>.

²⁶ See Elise Foley & Roque Planas, *Trump ICE Chief Wants to Prosecute Politicians Who Won't Lock Up More Immigrants*, HUFFPOST (Jan. 3, 2018), https://www.huffingtonpost.com/entry/immigration-ice-sanctuary-policies_us_5a4d6610e4b06d1621bd0682.

²⁷ *Bush Says it is Time for Action*, CNN.com (Nov. 6, 2001 10:01 PM), <http://edition.cnn.com/2001/US/11/06/ret.bush.coalition/index.html>.

²⁸ ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 3 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971).

²⁹ *Id.* at 200–01.

³⁰ *Id.* at 3.

³¹ Republic of Slovenia, Statistical Office RS, SI-STAT Data Portal, Demography and Social Statistics, List of Tables, Data Selection/Variables and Values, *International Migration by Country of Citizenship and Sex, Slovenia, Annually*, https://pxweb.stat.si/pxweb/Dialog/varval.asp?ma=05N1008E&ti=&path=../Database/Demographics/05_population/40_Migration/05_05N10_International/&lang=1.

attempt to avoid deportation even as his government raised a fence on the country's southern border to keep migrants in Croatia and out of Slovenia.³²

Crimmigration's strong grip on law in various parts of the world gives it an undeniable juridical heft with which scholars have appropriately grappled. One of the most important contributions that crimmigration scholarship offers is that this area of law is neither civil administrative law nor criminal law. It is not both. Rather, it is something altogether different. Because it is neither civil administrative law nor criminal law the tools of legal analysis that are used in those areas are not necessarily fitting analytical devices. That is to say, there should be no presumption that crimmigration laws, policies, and judicial decisions should be treated like their immigration analogs just as there should be no presumption that they should be treated like their criminal law comparators. If they are to be treated like one or the other, there must be some supportive rationale. As a group, these articles disclose efforts by legislators, law enforcement officials, and courts to grapple with crimmigration law.

If crimmigration's hold on the governmental imagination is strong, as surely its spread across continents suggests it is, so too is the spirit of an alternative political imagination animating these articles. Understanding what is and how it came to be is nothing more than the first step toward what shall be. Along the way, academics, activists, policymakers, and visionaries of all stripes must declare what it is that should be because alternative possibilities are not born; they are created. Too much current scholarship and advocacy accepts the exclusions of present realities in which someone, somewhere is deserving because someone else, somewhere else is not. "[I]n desperate situations such as we are currently facing," writes Agon Hamza, "utopias are the only viable solution."³³

We must see in crimmigration a subversion of core components of what makes people worth fighting for and with: the imperfections that make us unique, the redemption that makes us forever incomplete, the contradictions that make us frustrating, and the unknowns that make us bewildering. Crimmigration punishes those features with the power of armed police, border walls, prison fences, and shackled deportations. In a recent collaboration with Hamza, Slavoj Žižek writes that the only way out of the present anti-migrant hysteria sweeping Europe (but, I would add, also the United States, Australia, Latin American, and elsewhere) is through a utopian embrace of strangeness. "The point is . . . not to recognize ourselves in strangers, not to gloat in the comforting falsity that 'they are like us', but to recognize a stranger in ourselves," he urges, "a recognition that we are all,

³² Daniel Boffey, *Slovenia PM Facing Impeachment Over Support for Refugee*, THE GUARDIAN (Nov. 23, 2017, 12:00 PM), <https://www.theguardian.com/world/2017/nov/23/slovenia-pm-miro-cerar-facing-impeachment-over-support-for-refugee>; SERGIO CARRERA ET AL., THE FUTURE OF THE SCHENGEN AREA: LATEST DEVELOPMENTS AND CHALLENGES IN THE SCHENGEN GOVERNANCE FRAMEWORK SINCE 2016 29 (2018).

³³ Agon Hamza, *The Refugee Crisis and the Helplessness of the Left*, in THE FINAL COUNTDOWN: EUROPE, REFUGEES AND THE LEFT 167, 186 (Jela Krečič ed., 2017).

each in our own way, strange lunatics”³⁴ It is easier to see the stranger in ourselves in dreams, so perhaps it is there that a forward-looking utopia is to be found about law and law enforcement.

Juridical utopias begin with morality but cannot end there. For utopian dreams to become policies, they must engage the political because crimmigration’s hold on the twenty-first century’s imagination is not merely moral; it is political. Crimmigration lives and breathes in boots on the ground, walls and fences, prisons, securitized seas, and deserts turned into graves, just as it does in trucks pulling “Go Home or Face Arrest” signs around London³⁵ and Israel’s repurposing of the Hebrew word for “infiltrators” to describe African migrants.³⁶ All of these reflect political judgments. Across time and national contexts, the unifying thread is a politics of racism mapped onto a politics of class cleavage. As markers of stigma, race and class never align perfectly. Neither do they ever part ways completely. They are always wrapped in one another symbiotically like lovers brought together by bitterness and kept together by the advantages of exclusion. In their willingness to move beyond the strictures of legal doctrine, co-opt morality, and tap the analytical power of critical theory, the articles in this collection reveal the politics of crimmigration law. It is a start on the march from the reality of crimmigration to the possibility of after crimmigration.

³⁴ Slavoj Žižek, *Terrorists with a Human Face*, in *THE FINAL COUNTDOWN: EUROPE, REFUGEES, AND THE LEFT* 187, 199 (Jela Krečič ed., 2017).

³⁵ Patrick Wintour, ‘Go Home’ Billboard Vans Not a Success, Says Theresa May, *THE GUARDIAN* (Oct. 22, 2013 7:11), <https://www.theguardian.com/politics/2013/oct/22/go-home-billboards-pulled>.

³⁶ See Michael Brodsky, *Migrant, Refugee or Infiltrator? How Our Language Affects Legislation*, *HAARETZ* (Sept. 9, 2015, 4:31am), <https://www.haaretz.com/opinion/.premium-migrant-refugee-or-infiltrator-1.5396856>.